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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-1314

RICHARD E. SPENCER,

Appellant,

vs.

LORRAINE B. SPENCER,

Respondent.

ON APPEAL FROM THE NORTH CAROLINA COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM JUDGMENT

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Pursuant to Rule 16(1)(c) of the rules of this Court, appellee moves the Court to affirm the judgment of the North Carolina Court of Appeals, on the ground that it is manifest that the question on which this cause depends is so insubstantial as not to need further argument.

In the alternative, pursuant to Rule 16 (1)(d) of the rules of this Court, appellee moves the Court to dismiss the appeal from the judgment of the North Carolina Court of Appeals, on the ground that the appellant is without standing to maintain the appeal.

STATEMENT

The appellant, Richard E. Spencer, and the appellee, Lorraine B. Spencer, were formerly husband and wife. On June 7, 1960, the parties entered into a separation agreement by the terms of which appellant agreed to make periodic alimony payments to appellee. (R.p. 45)

Pursuant to N.C.G.S. §52-6 (then N.C.G.S. §56-12), appellee received a private examination by an assistant clerk of superior court of Guilford County to approve her execution of the separation agreement. Appellant's execution of the agreement was notarized, but he did not receive a private examination. (R.p. 45)

During the negotiations which resulted in the separation agreement, both appellant and appellee were represented by counsel who were highly regarded members of the Greensboro, North Carolina, bar. (R.p. 45)

At the time of the separation, appellant was a board certified anesthesiologist with an M. D. degree. At that time appellee was only a high school graduate. (R.p. 47)

Pursuant to the agreement, appellant made monthly alimony payments to appellee through the end of the year 1975. (R.pp. 38-39) In 1976, appellant stopped making payments to appellee. (R.p. 42)

The district court of Guilford County rejected appellant's contentions that N.C.G.S. §52-6 was unconstitutional. The district court also concluded that because of appellant's degree of education, experience, and sophistication and his excellent legal representation, he would not have benefited in any way from a private examination if one had been made available to him. (R.pp. 50-51)

The North Carolina Court of Appeals held that appellant had not properly raised the question of the constitutionality of N.C.G.S. §52-6 because of a lack of standing, in that (1) if the statute were to have been held unconstitutional, the remedy would be to eliminate the private examination altogether, instead of requiring both males and females to be subjected to it, relief from which appellant would

stand to gain no benefit, and (2) appellant's degree of education, experience, and sophistication, and his excellent legal representation, were such that he could not have suffered any injury in fact from being denied a private examination. (J.S. 9-10-A)

ARGUMENT

Appellee believes that the North Carolina Court of Appeals did not err in refusing to hold N.C.G.S. §52-6 unconstitutional, and in concluding that appellant had no standing to attack the constitutionality of that statute.

I. THE PRIVATE EXAMINATION STATUTE DOES NOT UNCONSTITUTIONALLY DISCRIMINATE ON THE BASIS OF SEX.

If the merits of this case are reached, appellee submits that the case should be controlled by this Court's decision in Kahn v. Shevin, 416 U.S. 351 (1974), instead of the cases cited by appellant. Kahn v. Shevin deals with the validity of an annual $500.00 property tax exemption granted by Florida to widows, but not widowers. The Court in an opinion by Mr. Justice Douglas upheld the statute against the argument that it unconstitutionally discriminated on the basis of sex. The Court took note that the median income of working women was considerably lower than that

of working men. It was concluded that the purpose of the statute to reduce to some extent the disparity between economic capabilities of men and women, was a legitimate one.

The district court judge in the present case, who had served as an assistant clerk of superior court of Guilford County for many years, had conducted numerous private examinations pursuant to N.C.G.S. §52-6. The court took judicial notice that some wives have tended to be unduly influenced by their husbands, and some wives have been accustomed to leaving the financial affairs of the family entirely in the hands of their husbands, so that they are without training or experience in financial matters, and for both of these categories of wives the statutory procedure provides a valuable safeguard for their interests. The court went on to observe that for wives who do not fall in either of these categories, the statutory procedure is not necessary, but at the same time does no harm. The court further expressed the view that instances of husbands being unduly influenced by wives or being deprived of familiarity with the family financial situation was so rare, because of the customs and traditions of our society, that extending the opportunity to husbands for being privately examined would not have any practical beneficial result. (R.p. 51)

The observations and conclusions of the district court in this case make it clear that N.C.G.S. §52-6, as applied, is very much analagous to the Florida statute upheld in Kahn v. Shevin. This statute has simply functioned to ameliorate some of the disadvantages suffered by some wives, those who are either too much under the influence of their husbands, or who have remained ignorant and unsophisticated about the family finances. The statutory procedure provided some benefit to women in this situation. The instances of men being in a similar situation, where they could have benefited by the statute, are so very rare according to our common experience, that a private examination for husbands would be of no practical advantage.

The question presented here is entirely different from the situations before this Court in several cases relied upon by appellant. In these cases the classifications determined to be invalid denied the members of one sex something that was clearly of benefit or advantage to them, such as the servicemen's dependency allowance in Frontiero v. Richardson, 411 U.S. 677 (1973), the social security benefits based on earnings of a deceased spouse in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), or the right to child support

between the ages of 18 and 21, in Stanton v. Stanton, 421 U.S. 7 (1975). The private examination, on the other hand, is not a significant benefit or advantage to husbands, and therefore, N.C.G.S. §52-6 is not unconstitutionally discriminatory.

If N.C.G.S. §52-6 can be perceived as being discriminatory at all, it discriminates against the wife and not against the husband. It is the women, not the men, who have protested against this statute and have brought about its repeal. The women who have sought its repeal regarded the statute as providing an unnecessary, paternalistic protection for wives, which is not consistent with modern conditions. See Legislative Research Commission, Report to the 1977 General Assembly, Sex Discrimination, pp. 100-102. Nowhere, except in appellant's arguments in this case, has it been suggested that the husband is injured by this statute; the obvious remedy in that case would be to make the private examination essential for both husbands and wives, not to repeal it altogether, as the North Carolina General Assembly has done. N. C. 1977 Sess. Laws, Ch. 375.

II. IT WAS PROPERLY HELD THAT APPELLANT IS WITHOUT STANDING TO CHALLENGE THE VALIDITY OF THE STATUTE.

The North Carolina Court of Appeals determined that for two reasons appellant did not have standing to contend that N.C.G.S. §52-6 is unconstitutional. First, the court concluded that if the statute were unconstitutional, the only proper remedy would be to strike the private examination requirement altogether, not to make it equally available to husbands and wives. Appellant has no standing to attack the statute, because he could not derive any benefit from a successful challenge to it. Second, the court found that appellant could demonstrate no injury as a result of the operation of the statute, because he could not have benefited in any way from a private examination if one had been available to him, because of his education, experience, sophistication, and excellent legal representation.

With respect to the first point, the court of appeals said:

> Defendant contends that the right to a privy exam is a valuable right and that we should, therefore, extend that right to him. We disagree. When first enacted, G.S. 52-6 (or, rather, its forerunner)

> conferred a right--the right to enter into a separation agreement. See Archbell v. Archbell, supra. The question is whether the requirement that women have a privy exam prior to entering a separation agreement is a permissible restriction. While in 1915 it was a permissible restriction, the privy exam itself is now and always has been a restriction on the exercise of a right--not a right in itself. This Court has previously held that freedom of contract is a valuable right. See North Carolina Assoc. of Licensed Detectives v. Morgan, Attorney General, 17 N.C. App. 701, 195 S.E.2d 356 (1973). We do not believe that infringing upon the freedom of contract enjoyed by married males would be the proper means to remedy the alleged invidious discrimination of G.S. §52-6. The proper remedy, indeed, the only remedy, would be to strike the privy exam requirement from G.S. §52-6. (J. S. 9-A)

As to the second point, the district court concluded that because of appellant's education, experience, and sophistication, and his extremely competent legal representation, he would not have benefited in any way from a private examination if one had been available to him, and further that he did not suffer any disadvantage or detriment on account

of appellee's being privately examined. (R.pp. 51-52) Appellant did not offer any evidence to controvert these conclusions. There were no arguments in appellant's brief in the court of appeals addressed to his exception to these conclusions. Under North Carolina rules of procedure, appellant abandoned the exception, and is not free to take an inconsistent position in this Court. Rule 28(a), North Carolina Rules of Appellate Procedure.

Taking these findings and conclusions as well-founded. it is clear that appellant personally has no standing to challenge the constitutionality of N.C.G.S. §52-6, since he has not been injured by the operation of the statute. It was so held by the North Carolina Court of Appeals.

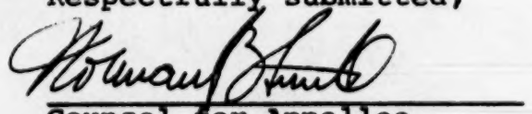
In several recent decisions of this Court involving closely analagous fact situations, litigants were held without standing to present constitutional questions. In Linda R. S. v. Richard D., 410 U.S. 614 (1973), the mother of an illegitimate child averred that state court interpretations of a criminal child support statute, as applying only to fathers of legitimate children, violated the equal protection clause of the Fourteenth Amendment. She sought an injunction requiring the district court to enforce the statute against the father of the child. This Court

held that the mother lacked standing, because she had made no showing that her failure to secure support payments resulted from the non-enforcement of the statute as to her child's father; the prospect that the requested prosecution, in fact, would result in the payment of child support, instead of jailing the father, was only speculative. Also supportive of appellee's position here and the decision of the court below are Warth v. Seldin, 422 U.S. 490 (1975), and Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976).

CONCLUSION

Appellee respectfully submits that the North Carolina Court of Appeals correctly decided that appellant has no standing to challenge the constitutionality of N.C.G.S. §52-6, and further appellee maintains that even if appellant does have standing to attack it, the statute is not inconsistent with the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,



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